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In the

Supreme Court of the United States.

OCTOBER TERM, 1946.

No.

AIDEN LASSELL RIPLEY, PETITIONER,

v.

FINDLAY GALLERIES, INC., A CORPORATION, AND GOES LITHOGRAPHING CO., A CORPORATION, RESPONDENTS,

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Aiden Lassell Ripley, plaintiff, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals of the Seventh Circuit to review a judgment of that Court entered July 9, 1946, denying plaintiff's petition for rehearing.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This action was brought in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin, and recover damages for, infringement of copyright, both at common law and under the Copyright Laws of the United States. The subject of the copyright was an original painting and work of art painted in 1941 by the petitioner Ripley, an artist, and entitled "Three

Grouse in Snow". Ripley is a resident and citizen of the Commonwealth of Massachusetts and the defendant Findlay Galleries is a Chicago art dealer and the defendant Goes Lithographing Company is a Chicago lithographer. Both defendants are corporations of the State of Illinois. Jurisdiction of the Court was based on the diversity of citizenship of the parties, the requisite amount in controversy, and on the Copyright Laws of the United States, and is not disputed.

The essential facts, *found by the District Court and fully supported by the record, are as follows:*

Petitioner Ripley on January 6, 1942, after personal solicitation by W. C. Findlay, Jr., President of defendant Findlay Galleries, consigned eleven of his paintings to Findlay Galleries for sale, one of the paintings being the water-color "Three Grouse in Snow" which was authorized to be sold by the dealer for $300 (less 1/3 commission to the dealer) (Finding No. 6, R. p. 236). Nothing was said at the time as to the reproduction rights to these paintings, but petitioner consigned them to the Galleries under *the long settled custom and understanding of the trade, that the dealer, as the artist's agent, is authorized to sell only the original painting, that the right to reproduce it is separate and distinct therefrom, and that the dealer has no authority to sell the reproduction rights thereto without the express permission of the artist and by special arrangement with him* (Finding No. 7, R. pp. 236–7). (Plaintiff's ample evidence establishing this custom was entirely uncontradicted by defendants). Both W. C. Findlay, Jr., president of Findlay Galleries, and Arthur A. Goes, president of Goes Lithographing Company, knew of this custom of the trade in April 1942 (Finding No. 8, R. p. 237). On March 14, 1942, defendant Findlay Galleries wrote plaintiff (Plf's Exh. 5, R. p. 173) that it had a client, an important lithographer *

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* Not Goes Lithographing Company—Goes Q. 91–94, R. p. 39.

who had done *calendars* for the Milwaukee Journal, and who that year was going to use a *calendar* of (Ripley's) type of subject, that the *calendar* was really a very artistic thing, and was writing to see

> ". . . if it would be agreeable to use any of your watercolors or etchings" (and) "if you might be interested in having us sell any of your watercolors for reproductions".

Plaintiff replied March 16, 1942 (Plf's Exh. 6, R. p. 175):

> "I have no objection to selling one of my pictures for reproduction, especially if it is well reproduced . . . I would rather sell your client a watercolor and if he would rather have me do something especially for him I think I could do it. *In this case I should ask a slightly higher price.*"**

A few days later, on March 24, 1942, another dealer, Sessler, in Philadelphia, wrote petitioner, specifically inquiring if Ripley was willing to have his watercolors sold *for reproduction in color prints* (Plf's Exh. 42-A, R. p. 219). To this letter petitioner replied April 2, 1942 (Plf's Exh. 42-B, R. pp. 219–20):

> " . . . I don't believe I want to sell copyrights of my pictures to anyone and as a matter of fact I have already turned down several similar offers to make *prints* in the past. I have nothing against an occasional reproduction for books, *calendars* or advertising and from your first letter thought your client might want something for these purposes. I am sorry to turn this down . . . "

On April 6, 1942, W. C. Findlay, Jr. surreptitiously and without the knowledge of petitioner, *personally* negotiated delivery of Ripley's painting "Three Grouse in Snow" to

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** Italics ours throughout.

defendant Goes Lithographing Company to permit its reproduction by the latter *in color prints*, in a transaction purporting to be an outright sale of the painting for $300, but which was in fact and effect merely a sale of the reproduction rights in the painting for $150 because defendant Goes had the right to return the painting when reproduction was completed and to receive $150 credit against other paintings to be delivered by Findlay (Finding Nos. 12–16, R. pp. 238–9). Even Goes' own written memorandum of the transaction states (Plf's Exh. 6-A, R. p. 177, Finding No. 13, R. p. 238):

"Findlay will sell Ripley @ 150.00 . . . "

whereas the authorized *selling price of the painting* was $300. The Goes Company reproduced petitioner's painting extensively in lithograph prints which it widely sold, returned the painting to Findlay in August 1942, and received its $150 credit therefor (Findings Nos. 14–15, R. p. 238). *Defendant Findlay Galleries did not report to petitioner the transaction with the Goes Company, either as a sale of his painting, or as a sale of the reproduction rights therein, and has never paid to petitioner the $150 received from Goes for permitting reproduction of the painting* (Finding No. 17, R. p. 239). *Findlay Galleries simply pocketed this money.* Thereafter, in reply to petitioner's repeated requests for the return of his painting, W. C. Findlay, Jr. *himself* concealed from petitioner his transaction with the Goes Company and until confronted with the reproductions *denied all knowledge of where the painting was* (Finding Nos. 18–22, R. pp. 239–240). On September 2, 1942, petitioner wrote W. C. Findlay, Jr. expressly stating (Finding No. 23, R. p. 240):

> " . . . that I do not want to sell any of my things to anyone who might intend to make *color prints* of them. I have turned down several offers of this sort and ask

your cooperation in preventing anyone from buying anything of mine for this purpose."

On November 17, 1942 *W. C. Findlay, Jr.*—not defendant Findlay Galleries—then bought the painting "Three Grouse in Snow" *from petitioner Ripley,* for *himself* paying therefor during the next eight months with four *personal* checks of $50 each until $200 was paid (the purchase price of $300 less 1/3 commission) (Findings Nos. 24, 25, R. pp. 240-1).

On September 15, 1943, petitioner Ripley for the first time learned of the reproduction of his painting when he saw prints of it in a Boston department store and demanded explanation from W. C. Findlay, Jr. The latter, in reply, attempted to place the blame for the reproduction on his salesman Priestly, although Findlay *himself* had negotiated the transaction with Goes (Findings, Nos. 25–27, R. pp. 241–2).

On September 25, 1943, petitioner registered his copyright in his painting "Three Grouse in Snow" in the Copyright Office in Washington, D. C. *as an unpublished work of art* * (pursuant to the Copyright Act, Title 17, U.S.C. Sec. 11), and received therefor Certificate Class G UNP, No. 42234. Shortly thereafter petitioner brought this suit against defendants for infringement of common law and statutory copyright (Finding No. 28, R. p. 242; Complaint, R. pp. 2–5).

As the facts show, this case is one in which an unscrupulous art dealer and lithographer conspired to defraud an artist of the reproduction rights to one of his paintings, where the dealer, surreptitiously delivered a painting to the lithographer for reproduction for $150 net, although the painting had been entrusted to the dealer for sale for $300, concealed the transaction from his artist principal, lied to him when

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* Petitioner could not register his copyright in the painting as a *published* work of art, because the Goes' reproductions had not borne the notice of copyright required by Title 17, U.S.C. Sec. 9.

asked to return the painting, pocketed the money received from his breach of trust, which properly belonged to his principal—and which conduct, under the Illinois Criminal Code, Secs. 74–75, constitutes the crime of Embezzlement by Agent.

On these simple facts the District Court (Judge Philip L. Sullivan) granted petitioner the relief sought (Interlocutory Judgment, R. pp. 246–7). But the Court of Appeals for the Seventh Circuit reversed the District Court, and dismissed the plaintiff's action as "without merit".

The facts stated above are the facts of the case—*found by the District Court and fully supported by the evidence.* The facts stated by the Court of Appeals in its Opinion (R. pp. 275-280) differ from the foregoing in several material respects, particularly as to W. C. Findlay, Jr.'s *personal* negotiation of the Goes' transaction *, but in such respects the Court's statement is not supported by the record, and is even *contrary* to the record. (Its many material errors of fact were called to the Court's attention in a Petition for Rehearing (R. pp. 285), but the petition was denied without opinion.)

The Court of Appeals specifically held that Findlay's delivery of the painting to the Goes Company for reproduction purposes (for which Findlay received $150, although the authorized selling price of the painting was $300) was an outright sale of the painting to the Goes Company—disregarding the finding of the District Court that the transaction was in effect and in fact merely a sale of the reproduction rights for $150 (Findings Nos. 13, 16, R. pp. 238–9). The Court then held that by his letter of March 16, 1942 (Plf's Exh. 6, R. p. 175) petitioner had *expressly authorized* defendant Findlay Galleries to sell any of his paintings for reproduction *in color prints.* The Court then held that W.

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* This was expressly admitted by W. C. Findlay, Jr. (R. p. 121, XQs. 53–54, 58).

C. Findlay, Jr.'s later purchase of the painting for himself from petitioner, and his payment of $200 to petitioner for the painting, "extinguished the obligation to plaintiff". The Court said expressly:

> "If title passed (to Goes Company) as we believe, then only an obligation remained for Findlay to remit to plaintiff the sum of $200.00, the net proceeds of the sale. When Findlay did subsequently pay the sum of $200.00 to plaintiff, although supposedly on another basis, this extinguished the obligation to plaintiff."

The Court further held that the Goes Company's reproduction of his painting by his "express authority" prevented petitioner from registering his copyright in the painting as an "unpublished work of art" pursuant to the Copyright Act, Title 17, U.S.C. Sec. 11, and that the copyright registration secured by plaintiff was thence invalid.

1. The decision of the Court of Appeals is contrary to the elementary and fundamental principles of the common law relating to both common law and statutory copyright, as expressed in the following decisions of this Court, and of many other courts, from very early times, and even carried into the express language of the Copyright Act of 1909, (Title 17, U.S.C. Sec. 41) *that an artist at common law and under the Copyright Act possesses the exclusive right to reproduce any work of art he creates, that this right (i.e., the copyright) is a valuable property right, and is separate and distinct from the work of art itself, that both can be separately conveyed, and that possession of, or transfer of title to, the work of art does not carry with it the copyright, unless such right is clearly granted:*

The Copyright Act (Title 17, U.S. Sec. 41).

Stephens v. *Cady*, 14 How. 528 at 530–531, 55 U.S. 528 (1852).

Stevens v. *Gladding*, 17 How. 447, at 453, 58 U.S. 447 (1854).

American Tobacco Co. v. *Werckmeister,* 207 U.S. 284 at 290–291, 293, 298–299, (1907).

Werckmeister v. *American Lithographic Co.,* 134 F. 321 at 323–4, (CCA 2, 1904).

Werckmeister v. *American Lithographic Co.,* 142 Fed. 827 at 830–831; (CCSDNY 1905) (Affirmed 148 F. 1022, (CCA 2, 1906)).

Werckmeister v. *Springer Lithographing Co.,* 63 F. 808 at 812, (CCSDNY 1894).

Millar v. *Taylor,* 4 Burrows, 2303 at 2396 (King's Bench, 1769).

Donaldson v. *Beckett,* 4 Burr. 2408, (House of Lords 1774).

Crowe v. *Aiken,* 6 Fed. Cas. 904 at 905–6, No. 3441 (CCND Ill. 1870).

Buck v. *Swanson,* 33 F. Supp. 377 at 387 (D.C.D. Neb. 1939, 3–Judge Court).

The Illinois authorities relating to common law copyright do not differ from the Federal authorities above listed. There is thus no question here of the Federal Court in a diversity of citizenship case being obligated to follow differing State court decisions, as in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1937).

It follows, of course, the copyright being separate and distinct from the work of art, that Findlay Galleries has defrauded petitioner of the proceeds of the sale of his painting for reproduction purposes by pocketing them, and by failing to report the transaction to petitioner.

2. The Court's decision is also contrary to the elementary and fundamental principles of Agency at common law and under Illinois law that an agent is a fiduciary, owing a duty to give his principal information relative to affairs entrusted to him, and to account for profits arising out of his employment, as represented by the following authorities:

Chicago Title & Trust Co. v. *Schwartz,* 339 Ill. 184 at 193–4, 171 N.E. 169 (1930).

Rieger v. *Brandt*, 329 Ill. 21 at 27–28, 160 N.E. 130 (1928).
Stemm v. *Gavin*, 255 Ill. 480 at 486.
Glover v. *Layton*, 145 Ill. 92 at 97, 34 N.E. 53 (1893).
Restatement of Agency, Secs. 13, 381, 382, 383, 388.

3. The Court's decision has in effect, extended the doctrine of *Pushman* v. *New York Graphic Society*, 287 N.Y. 302, 39 N.E. (2d) 249 (New York Court of Appeals, 1942) to the protection of a faithless dealer and conspiring lithographer, to whom it has no applicability. That decision involving a bona fide purchaser of a painting without notice of limitations on the dealer's authority, holds in effect that, as an *absolute rule of law*, unless there is an express reservation of reproduction rights by the artist, they pass to the purchaser on the sale of the painting. That case, defendants' principal reliance in the Courts below, is clearly distinguishable on its facts, and very plainly should not be extended to enable a dealer-agent to defraud his artist-principal of his reproduction rights. The Court of Appeals has in effect done so, however, in holding that the Findlay-Goes transaction was an outright sale of petitioner's painting, and that W. C. Findlay Jr.'s purchase of the painting from petitioner for himself "extinguished the obligation to plaintiff". Findlay Jr.'s subsequent purchase of the painting for himself, at a time when petitioner knew nothing of the Goes transaction, was very plainly an attempt to bring himself within the rule of the Pushman Case. The Pushman Case itself is contrary to the elementary and fundamental principles of the common law relating to both common law and statutory copyrights stated above under Point 1, and was based on a rule stated in *Parton* v. *Prang*, 18 Fed. Cas. 1273, No. 10,784 (CCD Mass. 1874), which the New York Court did not realize had been overruled by this Court in *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284 (1907). But the extension of the doctrine of the *Pushman Case* in

effect by the Court of Appeals herein to protect a defrauding dealer and lithographer is not only unnecessary, but most inequitable, and likewise contrary to the fundamental principles of law relating to both Copyright and Agency stated above.

The decision of the Court of Appeals herein allows any reproducer to bring himself within the rule of the *Pushman Case* merely by going through the *form* of buying a painting outright from the dealer at its stipulated price, whereas by having an understanding with the dealer that he can return the painting to the dealer when reproduction is completed, and receive a credit against other paintings for the value of the painting in excess of the value of its reproduction rights, he in effect and in reality is buying only the reproduction rights. And the decision allows any dealer to bring himself within the rule of the *Pushman Case* merely by buying the painting *himself,* and to then retain for himself all proceeds derived from permitting reproduction of the painting!

QUESTIONS RAISED BY THE CASE.

The case, therefore, raises the following questions:

1. To whom do the reproduction rights (*i.e.* the copyright) and the proceeds thereof, to a painting belong, either at common law or under the Copyright Statutes—to the artist who creates the painting, or to the dealer to whom he consigns the painting for sale?

2. Is a dealer to whom a painting is consigned for sale at a stipulated price, and who is authorized to sell and does sell the painting for reproduction purposes, nevertheless entitled to retain the proceeds of the sale of the painting for reproduction purposes, without accounting for the same to his artist-principal?

3. May a dealer, to whom an artist consigns a painting for sale at a stipulated price, but who also has authority to sell the painting for reproduction, not only sell the painting

for reproduction for less than its stipulated price, but be under no obligation to report the sale to his artist-principal, or even to account to him for the proceeds?

4. Does a transaction whereby a dealer purports to sell a painting outright to a lithographer for $300. to permit the latter to make reproductions of the painting, and then return the painting to the dealer as soon as reproduction is completed, and receive $150. credit against other paintings to be delivered, constitute a sale of the painting for $300. whereby title passed to the lithographer or constitute merely a sale of the reproduction rights (or copyright) for $150.?

5. Does it make any difference as to the dealer's right to retain the proceeds of the sale of the painting for reproduction purposes, that the dealer thereafter buys the painting for himself, and pays the artist the stipulated purchase price therefor, less the dealer's commission?

6. Does the subsequent purchase of the painting by the dealer for himself under such circumstances operate retroactively to carry with it the reproduction rights previously sold, and entitle the dealer, rather than his artist principal, to the proceeds thereof?

The construction placed by the Court of Appeals on petitioner's letter of March 16, 1942 (Plf's Exh. 6, R. p. 175), as an *express authorization* to sell his paintings for reproduction in color prints, however unfounded, is of no moment here, and does not affect the legal questions here presented. Even if "expressly authorized" to sell the paintings for reproduction purposes, the legal questions raised by the case remain unanswered. The fact also remains that the "express authorization" was not acted upon and the painting was not sold pursuant to it. The painting was *authorized* to be sold for $300, yet Findlay Galleries "sold" it to Goes for $150 net, and W. C. Findlay, Jr. then found it expedient to buy the painting *directly* from petitioner!

The decision of the Court of Appeals throws into a complete state of confusion the question of ownership of the

reproduction rights to paintings (*i.e.*, the copyright), both at common law, and under the Copyright Statutes. Do the reproduction rights and their proceeds belong to the artist who creates the painting, or to the dealer to whom the artist consigns the painting for sale? The Court's decision expressly holds that a dealer to whom an artist consigns a painting for sale at a stipulated price, but who also has authority to sell the painting for reproduction, may not only sell the painting for reproduction *for less than the stipulated price*, but is under no obligation to report the sale to his artist-principal, or even to account to him for the proceeds received! If the dealer then purchases the painting for himself, paying the artist the stipulated price therefor (less commission), he extinguishes all obligation to the artist! The Court's decision thus holds that a painting and its copyright are one and the same thing, and that the copyright to the painting and the proceeds thereof belong to the dealer-agent, if he subsequently buys the painting, and not to the artist-principal!

This astounding result was reached because the Court plainly did not understand the basic nature of copyright, or the right to reproduce, a painting or other work of art, that it is intangible property, but that it has value and that it exists and can be transferred, apart from the painting itself. The Court plainly regarded the painting and the right to reproduce it (*i.e.*, the copyright) as one and the same thing—that possession or title to the painting necessarily carried the copyright with it, as the *Pushman Case* held. Believing this, the Court could see no wrong in defendants' acts, and it justified in the Court's mind ignoring the facts found by the District Court, and in accepting the version of the facts represented to the Court by Defendants' Brief, without critically examining to see if they were supported by the record herein. Because of this basic difficulty, the Court was unable to recognize the most obvious fraud, breach of trust, falsehood, and conspiracy by the dealer and lithographer

to cheat the artist of the reproduction rights to his paintings, when confronted with it. The Court was thus unable to detect the difference between the *form* of a sale of the painting, and the *substance* of a sale of the reproduction rights for one-half the cost of the painting! The Court thus has rendered a decision protecting two transparent wrongdoers against their innocent victim, allowed Findlay Galleries to unjustly enrich itself by $150, with its obligation to petitioner "extinguished", and has precluded even an action, by amended complaint, or otherwise, by the artist for money had and received and unlawfully retained by his agent!

If the decision of the Court of Appeals stands, it will effectively destroy the property of artists in the reproduction rights or copyrights in their paintings, and render the artist utterly helpless against every unscrupulous dealer who would defraud him of those rights. The Court of Appeals has provided the formula. Whether or not the dealer is authorized to sell a painting for reproduction purposes, he need only go through the *form* of selling the painting outright to the reproducer at its stipulated price, allow the reproducer to return it when through with its reproduction, and give the reproducer a rebate or credit for the value of the painting in excess of its reproduction rights. The dealer then buys the painting for himself, and pays the artist therefore (less his commission). The dealer then owns the painting and can do with it as he pleases, and can even pocket the proceeds of what is in effect the sale of the reproduction rights, with complete immunity, and with all obligation "extinguished"—as the Court of Appeals has ruled. The artist is now completely at the mercy of the unscrupulous dealer, because of the inability of the Court of Appeals to recognize fraud, and to see through obvious sham and subterfuge, when face to face with it. As a precedent, the decision of the Court of Appeals utterly destroys the artist's property in his reproduction rights.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioners respectfully pray that the Writ be allowed for the following reasons:

1. Because the decision of the Circuit Court of Appeals is contrary to the fundamental principles of the common law as to copyrights, as established by the decisions of this Court in *Stephens* v. *Cady*, 14 How. 528 (1852); *Stevens* v. *Gladding*, 17 How. 447 at 453 (1854) and *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284 (1907), and of many other courts.

2. Because the decision of the Circuit Court of Appeals is contrary to the fundamental principles of Agency established in the common law and by the controlling decisions of the State Courts of Illinois.

3. Because the decision of the Court of Appeals has in effect extended the doctrine of *Pushman* v. *New York Graphic Society*, 287 N.Y. 302, 39 N.E. (2d) 249, (New York Court of Appeals 1942) to protect a defrauding dealer and lithographer, to whom the doctrine has no applicability, and is contrary to the settled principles of the law of Copyright and Agency.

4. Because the public interest in the protection of artistic property requires that the question as to ownership of reproduction rights in paintings and the proceeds thereof, as between artist, dealer and reproducer, be settled.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete Transcript of Record and of proceedings in the case numbered and entitled on its docket No. 8883, Aiden Lassell Ripley, Plaintiff-Appellee *v.* Findlay Galleries, Inc. a cor-

poration, and Goes Lithographing Company, a corporation, Defendants-Appellants, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray

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In the

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OCTOBER TERM, 1946.

No. .

AIDEN LASSELL RIPLEY, PETITIONER,

v.

FINDLAY GALLERIES, INC., A CORPORATION, AND GOES LITHOGRAPHING COMPANY, A CORPORATION, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This petition is brought to review a decision of the Circuit Court of Appeals for the Seventh Circuit in an action to enjoin and recover damages for infringement of copyright in a painting, both at common law and under the Copyright Laws of the United States. The decision, written by Judge Briggle and reported in 155 F. (2d) 955 (R. p. 175) reversed the decision of the District Court holding the plaintiff's common law and statutory copyrights valid and infringed and dismissed the action.

A sufficient statement of the case, we believe, appears in the Petition under Summary and Short Statement of the Matter Involved.

JURISDICTION.

The date of the judgment to be reviewed is the date of the judgment of the Circuit Court of Appeals denying Petitioner's Petition for Rehearing, July 9, 1946 (R. p.327). The Statute giving jurisdiction is Sec. 240a of the Judicial Code, Title 28, U.S.C. Sec. 347, as amended by the Act of February 13, 1925. Jurisdiction of the Court in diversity of citizenship cases is sustained in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1937), and in statutory copyright cases in *Douglas* v. *Cunningham,* 294 U.S. 207 (1934).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding in effect that the reproduction rights or copyright to a painting, and the proceeds thereof belong to the dealer-agent to whom the artist consigns the painting for sale.

2. The Circuit Court of Appeals erred in holding that a dealer to whom an artist consigns a painting for sale at a stipulated price, but who also has authority to sell the painting for reproduction purposes, may not only sell the painting for reproduction *for less than the stipulated price,* but is under no obligation to report the sale to his artist principal, or even to account to him for the proceeds received.

3. The Circuit Court of Appeals erred in holding that when a dealer authorized to sell a painting for reproduction purposes, purchases the painting for himself, paying the artist the stipulated price therefor (less his commission) that he thereby extinguishes all obligation to his artist-principal and may retain the proceeds derived from selling the painting for reproduction purposes at less than the stipulated price, which sale he did not report to his artist-principal.

4. The Circuit Court of Appeals erred in holding that the Findlay Galleries-Goes transaction constituted an outright

sale of the painting to the Goes Company for $300. rather than a mere sale of the reproduction rights, when Goes had the right to return the painting when reproduction was completed and receive $150 credit against other paintings to be delivered.

5. The Circuit Court of Appeals erred in holding that petitioner's letter of March 16, 1942 (Plf's. Exh. 6, R. p. 175) constituted an express authorization to sell any of his paintings for reproduction in color prints.

6. The Court of Appeals erred in not following the fundamental and established principles of the law of agency that an agent is a fiduciary to his principal, in determining the ownership of common and statutory law copyrights and the proceeds thereof between the artist-principal and his dealer-agent.

7. The Circuit Court of Appeals erred in not affirming the judgment of the District Court sustaining the validity and infringement of the Petitioner's Copyright, both at common law and under the Copyright Statutes.

ARGUMENT.

Point I. The Decision of the Court of Appeals Is Contrary to the Fundamental Principle That An Artist at Common Law Possesses the Exclusive Right to Reproduce Any Work of Art He Creates, and the Right is Separate and Distinct from the Work of Art Itself. This Right Exists until the Work is Published with His Consent. Transfer of Title to or Possession of the Work Does Not Carry with it the Right to Reproduce Such Work, Unless Such Right is Clearly granted.

The fundamental fallacy of the decision of the Court of Appeals lies in regarding the painting and the right to reproduce it (*i.e.*, the copyright) as one and the same thing, and that possession or title to the painting necessarily carries the copyright with it. This concept is wholly contrary

to the settled law, as stated by our highest courts from the earliest days of the recognition of copyright in the English common law, to the present.

The Copyright Act, Title 17, U.S.C. Sec. 41, expressly states:

> "That the copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

In *Stephens* v. *Cady,* 14 How. 528, 55 U.S. 528 (1852), this Court pointed out the distinction in a copyright suit involving a map wherein the defendant justified the infringement because it had bought the engraved plate for the map in an execution against the copyright owner. The court held the defendant had not thereby acquired the copyright. Mr. Justice Nelson said (pp. 530–531):

> ". . . *the property acquired by the sale in the engraved plate, and the copyright of the map secured to the author under the act of Congress, are altogether different and independent of each other, and have no necessary connection. The copyright is an exclusive right to the multiplication of the copies, for the benefit of the author or his assigns, disconnected from the plate, or any other physical existence.* It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar* v. *Taylor,* (4 Burr. 2396), 'a property in notion, and has no corporeal tangible substance.'
>
> "The engraved plate and the press are the mechanical instruments, or means by which the copies are multiplied, as the types and press are the instruments by

which the copies of a book are produced. And to say that the right to print and publish the copies, adheres to and passes with the means by which they are produced, would be saying, in effect, that the exclusive right to make any given work of art necessarily belonged to the person who happened to become the owner of the tools with which it was made; and that if the defendant in this case had purchased the stereotyped plates of a book, instead of the engraved plate, he would have been entitled to the copyright of the work, or at least, to the right to print, publish, and vend it; and yet, we suppose that the statement of any such pretension is so extravagant as to require no argument to refute it. *Even the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are two separate and distinct interests.* 4 Burr. 2330, 2396; 2 Eden, R. 329; 2 Atkyns, R. 342; 2 Story, R. 100.

"Lord Mansfield, observed, in *Millar* v. *Taylor*, that 'no disposition, no transfer of paper upon which the composition is written, marked, or impressed (though it gives the power to print and publish), can be construed a conveyance of the copy (by which he means copyright, as appears from a previous part of his opinion), without the author's express consent 'to print and publish', much less against his will'.

" 'Now, it seems to us, that the transfer of the manuscript of a book by the author would, of itself, furnish a much stronger argument for the inference of a conveyance of the right to multiply copies, than exists in the case of a transfer of the plate in question, or of the stereotype plates, as the ideas and sentiments, or in other words, the composition and substance of the work, is thereby transferred. *But the property in the copy-*

right is regarded as a different and distinct right, wholly detached from the manuscript, or any other physical existence, and will not pass with the manuscript unless included by express words in the transfer.' "

In *Stevens* v. *Gladding,* 17 How. 447, 58 U.S. 447 (1854), a copyright infringement suit involving the same map and facts as in the previous case, Mr. Justice Curtis said (p. 453):

> "But the right in question is not parcel of the plate levied on, nor a right merely appendant or appurtenant thereto; but a distinct and independent property, subsisting in grant from the government of the United States, not annexed to any other thing, either by the act of its owner or by operation of law."

In *American Tobacco Co.* v. *Werckmeister,* 207 U.S. 284 (1907), this Court considered at length the distinction between the original painting, and the copyright, or right to reproduce it. Mr. Justice Day said (pp. 290–291, 293, 298–299):

> "A copyright, as the term imports, involves the right of publication and reproduction of works of art or literature. A copyright, as defined by Bouvier's Law Dictionary, Rawles' edition, volume 1, p. 436, is: 'The exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing and vending copies of certain literary or artistic productions.' And further, says the same author, 'the foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms of characters, he may, if he chooses, confine to himself or impart to others'. That is, the law recognizes the artistic or literary productions of intellect or genius, not only to the extent which is involved in dominion over and ownership of the thing created, but

also the intangible estate in such property which arises from the privilege of publishing and selling to others copies of the thing produced. . . ."

"As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought."

"And a strong consideration in construing this statute has reference to the character of the property sought to be protected. It is not the physical thing created, but the right of printing, publishing, copying, etc., which is within the statutory protection." . . .

"While it is true that the property in copyright in this country is the creation of statute, the nature and character of the property grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work. We think every consideration of the nature of the property and the things to be accomplished supports the conclusion that this statute means to give to the assigns of the original owner of the right to copyright an article the right to take out the copyright secured by the statute, independently of the ownership of the article itself."

In *Werckmeister* v. *American Lithographic Co.*, 134 F. 321 (CCA 2, 1904) the Court considered the distinction between the original painting and the copyright therein. Townsend, C.J. said (pp. 323–4):

"A copyright is an incorporeal right to print and publish. *Trustees* v. *Greenough*, 105 U.S. 527, 530, 26 L. Ed. 1157. It is a property in notion, without corpo-

real, tangible substance. *Millar* v. *Taylor*, 4 Burr. 2303. *This property is a different and independent right, detached from the corporeal property out of which it arises. Stephens* v. *Cady*, 14 How. 528, 14 L. Ed. 528. *Each of these is capable of existing and being owned and transferred independent of the other. Stevens* v. *Gladding*, 17 How. 447, 15 L. Ed. 155. The recognition of the doctrine of a distinctive literary property has existed from very early times. 2 Lewis' Blackstone, 407. The senate of the republic of Venice in 1469 granted to one John of Spira the exclusive privilege for five years of printing the letters of Cicero and Pliny. Two centuries Growth of American Law, 422. Blackstone considers this exclusive right of property as grounded on labor and invention and reducible to the head of occupancy. 2 Lewis' Blackstone, 405. The protection of the result may be considered as due to original acquisition."

To similar effect are:

Werckmeister v. *American Lithographic Co.*, 142 Fed. 827 at 830–831 (CCSDNY 1905) (Affirmed 148 F. 1022, (CCA 2, 1906) without opinion).

Werckmeister v. *Springer Lithographing Co.*, 63 F. 808 at 812 (CCSDNY 1894).

Millar v. *Taylor*, 4 Burr. 2303 at 2396 (King's Bench, 1769).

Donaldson v. *Beckett*, 4 Burr. 2408, (House of Lords, 1774).

Crowe v. *Aiken*, 6 Fed. Cas. 904 at 905–6, No. 3441 (C.C.N.D. Ill. 1870, Drummond, C.J.).

Buck v. *Swanson*, 33 F. Supp. 377 at 387 (D.C.D. Neb. 1939, 3 Judge court).

Ball—Law of Copyright and Literary Property, p. 26–28 (1944) and cases cited.

Point 2. The Decision of the Court of Appeals is also Contrary to the Simple Elementary and Fundamental Principles of Agency at Common Law and Under the Illinois Law, that an Agent is a Fiduciary Owing a Duty to Give His Principal Information Relating to Affairs Entrusted to Him and to Account for Profits Arising Out of His Employment.

The decision of the Court of Appeals is contrary to the elementary and fundamental principles of agency at common law and under the Illinois law.

Defendant Findlay Galleries has proved utterly faithless to its trust as a dealer. In Illinois, as elsewhere, an agent is a fiduciary as to matters within the scope of his agency.

In *Chicago Title & Trust Co.* v. *Schwartz,* 339 Ill. 184 at 193–4, 171 N.E. 169 (1930), Commissioner Edmunds said:

> "The relation existing between a principal and agent for the sale of property is a fiduciary one, and the agent, in the exercise of good faith, is bound to keep his principal informed of all matters which come to his knowledge pertaining to the subject matter of the agency. (*Rieger* v. *Brandt,* 329 Ill. 21.) The rule is that the principal has a right to assume when he employs an agent, unless he is advised to the contrary, that the agent is in a situation to give to his principal that undivided allegiance and loyalty which the proper performance of the agency requires and that he will remain in that situation. If, without the knowledge and consent of his principal, the agent becomes the agent of the opposite party as well and undertakes by contract to bind his original principal, the law deems the original principal in that transaction to be practically unrepresented, and any bargain in his name or act done on his account is usually voidable at his option."

See also:

Rieger v. *Brandt,* 329 Ill. 21 at 27–28, 160 N.E. 130 (1928).
Lerk v. *McCabe,* 349 Ill. 348, 182 N.E. 388 (1932).
Restatement of Agency, Sec. 13.

Under Illinois law also an agent in dealing with the principal on his own account in regard to a subject matter to which he is employed is subject to a duty to deal fairly with the principal and to communicate to him all material facts in connection with the transaction of which he has notice.

In *Johnson* v. *Bernard,* 323 Ill. 527, 154 N.E. 444 (1926) Mr. Justice Heard said:

> "An agent for the sale of property is prohibited from having any interest, directly or indirectly, in the sale without the consent of his principal, after full knowledge of every fact known to the agent which might affect the principal's interest, and if a purchaser, knowing of the relation, enters into an agreement with the agent to buy land of the principal, ostensibly for himself but secretly for the agent, the principal, upon learning the facts, may rescind the sale and reclaim his land. *Tyler* v. *Sanborn,* 128 Ill. 136; *Glover* v. *Layton,* 145 id. 92; *Linn* v. *Clark,* 295 id. 22."

See also:

Rieger v. *Brandt,* 329 Ill. 21 at 27–28, 160 N.E. 130 (1928).
Linn v. *Clark,* 295 Ill. 22.
Lerk v. *McCabe,* 349 Ill. 348, 182 N.E. 388 (1932).
Restatement of Agency, Sec. 390.

Findlay Galleries failed entirely to inform Ripley of the transactions with Goes.

Under the Illinois law also, an agent who makes a profit in connection with transactions conducted by him on behalf of his principal is under duty to give such profit to the

principal. In *Stemm* v. *Gavin*, 255 Ill. 480 at 486, Judge Cartwright said (p. 486):

> "Agents, and those acting in a fiduciary capacity, are held to the strictest fairness and integrity, and in equity an agent is disabled from dealing in the matter of the agency on his own account and will be compelled to transfer the benefit of his contract to his principal. Any personal benefit obtained by an agent in violation of his duty will be held to inure to the benefit of the principal, and if the agent makes any profit to himself by virtue of his position he must account therefor as for a trust. (*Dennis* v. *McCagg*, 32 Ill. 429; *Davis* v. *Hamlin*, 108 id. 39; *Salsbury* v. *Ware*, 183 id. 505.)"

See also:

Glover v. *Layton*, 145 Ill. 92 at 97, 34 N.E. 53 (1893).
Perry v. *Engel*, 296 Ill. 549 at 554, 130 N.E. 340 (1921).
Fox v. *Simons*, 251 Ill. 316 at 321–322, 96 N.E. 233 (1911).
Restatement of Agency, Sec. 388.

Findlay Galleries here failed to pay over the money ($150 net) which it received from Goes for permitting the reproduction of the Ripley painting.

The Court of Appeals plainly overlooked these elementary and fundamental principles of Agency in holding that the dealer-agent was not required to report his dealings in his principal's property to his principal and could retain even the proceeds of his dealings with his principal's property. This situation is not affected by the alleged "express authorization" to sell petitioner's paintings for reproduction purposes in color prints. The dealer-agent was still bound to a duty to report his dealings and to account therefor to his principal.

Point 3. The Court's Decision Has In Effect Extended the Doctrine of Pushman v. New York Graphic Society, 287 N.Y. 302, 39 N.E. 2d. 249 (New York Court of Appeals 1942) to Protect a Faithless Dealer and Conspiring Lithographer, to Whom it Has no Applicability.

The *Pushman Case* was defendant's principal reliance in the District Court and Court of Appeals. In that case Pushman, an artist, consigned a painting for sale to the Grand Central Galleries in New York City, without specific reservation of rights to reproduce, and in due course the painting was sold to the University of Illinois, which hung the painting in its museum for some ten years. On solicitation by the New York Graphic Society, well known reproducers of prints, the University sold the right to reproduce the Pushman painting to the Society and lent the painting for this purpose. Pushman learned of the transaction and brought suit to enjoin reproduction of the painting. Judgment was for the defendant on the ground that by the unrestricted sale of his painting to the University without notice of reservation of rights to reproduce, Pushman had abandoned his rights to reproduce the painting in question. The painting there was not copyrighted under the Federal Statutes and the action was based on common law copyright.

The Court of Appeals herein, by holding that the Findlay-Goes transaction was an outright sale of petitioner's painting, and that W. C. Findlay Jr.'s purchase of the painting from Petitioner for himself "extinguished the obligation to plaintiff", has in effect extended the doctrine of the *Pushman Case* to the protection of a dealer-agent, and a lithographer in privity with him. The Court of Appeals' decision reached exactly the same result, and enables the dealer-agent to defraud his artist-principal of his reproduction rights.

In the *Pushman Case* the New York Court of Appeals re-

lied heavily on *Parton* v. *Prang,* 18 Fed. Cas. 1273, No. 10784, (CCD. Mass. 1872). The Court, however, failed to note that the doctrine for which it was cited was in effect overruled by this Court in *American Tobacco Company* v. *Werckmeister,* 207 U.S. 284 (1907), and also that the case arose long prior to the present Copyright Act of 1909 which changed the previous law and for the first time accorded copyright protection to certain *unpublished* works, including works of art.

The *Pushman Case,* and now the case at bar, are perpetuating a rule of law which no longer has any applicability, and the Court herein has even extended the rule to the protection of a defrauding dealer!

The situation, therefore, very urgently needs correction, and this fundamental conflict betwen the cases can only be resolved by this Court. The mistaken concept of the nature of copyright evidenced in the *Pushman Case,* has reached its *reductio ad absurdum,* in permitting an unscrupulous dealer and lithographer, conspiring with him to defraud an artist of the reproduction rights to his painting, and the proceeds thereof. When a mistaken concept as to the nature of copyright, that the painting and the copyright are regarded as one and the same thing, and that possession or title to the painting necessarily carries the copyright with it, reaches such an unjust and inequitable result, we respectfully submit that the situation requires the interposition of this Court.

CONCLUSION.

Copyright, or the artist's, author's or composer's property in the right to reproduce his own works, has been deemed worthy of protection for many hundreds of years in all civilized countries. The law has sought to protect the artist, author and composer against piracy of his works, and the courts have been astute to see through the schemes of all unscrupulous persons who have sought to defraud the artist, author and composer of his reproduction rights. The present case presents an instance of the most bare-faced and brazen pilfering of an artist's reproduction rights ever to come before any court, and one of the most ingenious schemes, that of purchase of the painting by the dealer himself after he had surreptitiously disposed of the reproduction rights in a sham "sale" of the painting for one-half its stipulated price, in an obvious attempt to bring himself within the rule of the *Pushman Case*, then recently decided. The Court of Appeals for the Seventh Circuit, apparently unfamiliar with the basic concepts of copyrights, and the business of dealing in reproduction rights in artist's paintings, accepted the righteous "explanations" of the defendants without critically examining to see if they were in fact supported by the record, and found the defendants had done no wrong. The result was that the scheme succeeded, the unscrupulous dealer was held entitled to retain the proceeds of the reproduction rights, his subsequent purchase of the painting had "extinguished his obligation". The decision is an open invitation to every other unscrupulous dealer to do the same thing—and leaves the artist completely at his mercy. The decision, unless reversed by this Court, effectively destroys the artist's property in his reproduction rights.

We respectfully submit that the decision of the Court of Appeals herein is in conflict with the settled and fundamental principles of copyright and of agency, and that the

questions involved are of such public importance that this Court should authoritatively determine them. We respectfully submit that this case is one calling for the exercise by this Court of its supervisory powers that this question of ownership of the reproduction rights to paintings between artist, dealer, and reproducer may be made clear; and to that end, that a Writ of Certiorari be granted.

Respectfully submitted,

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